FILE COPY

Office-Supreme Court, U.S.
FILED
JAN 27 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959.

No. 111.

MAX SCHAFFER and NORMAN SCHAFFER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONERS.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for Petitioners.

IRVING W. COLEMAN,
1820 Main Street,
Northampton, Pa.,
Of Counsel.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Rules Involved	2
Statement	5
A. Summary of the Proceedings	5
B. The Prosecution's Case	8
C. Consideration and Disposition at the Trial of the Issue Whether Any Agreement United the Several Shipments	9
D. The Opinion Below	15
Summary of Argument	16
Argument	23
I. Once the Conspiracy Counts Were Dismissed, It Was Wholly Improper to Submit to the Jury Simultaneously the Unrelated Substantive Counts Against These Petitioners, Against Marco, and Against Karp	23
II. It Was Improper for the Court Below to Sustain the Convictions on Appeal by Deciding Against Petitioners a Factual Issue Which They Had Unsuccessfully Sought to Have Submitted to the Jury at the Trial	35
III. Since Section 2314 of the National Stolen Property Act Limits the Federal Offense Interstate Transportation of Stolen Goods to a Transportation Having a Value of $5,000 or More, It Was Manifest Error to Permit Convictions of Petitioners by Adding Together the Value of Separate and Distinct Shipments, No One of Which Involved the Statutory Amount	40
Conclusion	49

INDEX (Continued).

Page

APPENDIX:

H. R. Rep. No. 1462 (Transportation of Stolen Property in Interstate Commerce) A1

H. R. Rep. No. 1599 (Extend Provisions of National Motor Vehicle Theft Act to Other Stolen Property) A5

Statement of the Managers on the Part of the House A7

H. R. Rep. No. 422 (Amending the National Stolen Property Act) A9

Extract From Government's Brief A17

TABLE OF CASES CITED.

	Page
Andrews v. United States, 108 F. 2d 511 (C. A. 4, 1939)	10, 14, 20, 22, 36, 45, 47
Association v. Westinghouse Elec. Co., 348 U. S. 437	40
Bell v. United States, 349 U. S. 81	48
Berger v. United States, 295 U. S. 78	27, 31
Blumenthal v. United States, 332 U. S. 539	31
Cartwright v. United States, 146 F. 2d 133 (C. A. 5)	45
Coco v. United States, 289 Fed. 33 (C. A. 8)	29
Cole v. Arkansas, 333 U. S. 196	36
Commissioner of Internal Revenue v. Acker, 361 U. S. 87	42
De Jonge v. Oregon, 299 U. S. 353	37
Dunaway v. United States, 205 F. 2d 23 (D. C. Cir.)	31
Dunn v. United States, 284 U. S. 390	17, 25
Grunewald v. United States, 353 U. S. 391, reversing United States v. Grunewald, 233 F. 2d 556 (C. A. 2)	19, 20, 35, 36, 39
Kleven v. United States, 240 F. 2d 270 (C. A. 8)	24
Kotteakos v. United States, 328 U. S. 750	17, 25, 26, 28, 33
Ladner v. United States, 358 U. S. 169	42
Lile v. United States, 264 F. 2d 278 (C. A. 9)	36
McBoyle v. United States, 283 U. S. 25	48
McElroy v. United States, 164 U. S. 76	17, 28
Opper v. United States, 348 U. S. 84	31
Delli Paoli v. United States, 352 U. S. 232	31, 32
People v. Cox, 286 N. Y. 137, 36 N. E. 2d 84	45
People v. Serna, 43 Cal. App. 2d 106, 110 P. 2d 492	45
Robinson v. United States, 210 F. 2d 29 (D. C. Cir.)	31
Schooner Hoppet v. United States, 7 Cranch 389	37
Selvester v. United States, 170 U. S. 262	25
United States v. Bando, 244 F. 2d 833 (C. A. 2)	31
United States v. Cardiff, 344 U. S. 174	48

TABLE OF CASES CITED (Continued).

	Page
United States v. Chieppa, 241 F. 2d 635 (C. A. 2)	31
United States v. Dietrich, 126 Fed. 664 (D. Neb.)	30
United States v. Geare, 293 Fed. 997 (App. D. C.)	29
United States v. Gordon, 253 F. 2d 177 (C. A. 7)	36
United States v. Harvick, 153 F. Supp. 696 (D. N. Dak.)	29
United States v. Haupt, 136 F. 2d 661 (C. A. 7)	26
United States v. Hudson, 7 Cranch 32	42
United States v. Lebron, 222 F. 2d 531 (C. A. 2)	31
United States v. Leviton, 193 F. 2d 848 (C. A. 2)	31
United States v. Nash, 51 F. 2d 253 (S. D. N. Y.)	31
United States v. Nash, 54 F. 2d 1006 (C. A. 2)	31
United States v. Resnick, 299 U. S. 207	48
United States v. Stracuzza, 158 F. Supp. 522 (S. D. N. Y.)	1, 25
United States v. Thomas, 135 F. Supp. 662 (E. D. Pa.)	45
United States v. Welsh, 15 F. R. D. 189 (D. D. C.)	29, 30

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
52 C. J. S., § 139, p. 987	39
Federal Rules of Criminal Procedure:	
Rule 8(a)	47
Rule 8(b)	4, 15, 16, 17, 25, 30
Rule 14	4, 5
Rule 51	24
Rule 52(a)	27
Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 529 (1947)	40
Hall, Federal Anti-Theft Legislation, 1 Law and Contemp. Prob. 424 (1934)	41
H. R. Rep. No. 304, 80th Cong., 1st Sess., p. A145	44
National Stolen Property Act, Section 2314	40
Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretions, 13 Law and Contemp. Prob. 64 (1948)	46
2 Sutherland, Statutory Construction (3rd ed.) §§ 5108, 5109	40
18 U. S. C. § 2	2, 12
18 U. S. C. § 371	6
18 U. S. C. § 417 (1940-1946 editions)	41, 43
18 U. S. C. § 2311	2, 3, 21, 42, 43, 48
18 U. S. C. § 2312	41
18 U. S. C. § 2313	41
18 U. S. C. § 2314	2, 3, 5, 6, 14, 21, 36, 41
18 U. S. C. § 2315	41
18 U. S. C. § 2316	41
18 U. S. C. § 2317	41
28 U. S. C. § 391 (1926 to 1946 editions)	27
National Stolen Property Act, adopted May 22, 1934 Section 5	41, 42

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. 111.

MAX SCHAFFER AND NORMAN SCHAFFER,
Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 104-118) is reported at 266 F. 2d 435. The memorandum opinion of the District Court relating to the motion for severance is reported at *United States v. Stracuzza*, 158 F. Supp. 522.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 21, 1959 (R. 119). Petition for rehearing was denied on May 14, 1959 (R. 119-120). The petition for a writ of certiorari was filed on June 11, 1959, and was granted on October 12, 1959 (R. 121), 361 U. S. 809. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether, after a conspiracy count against several defendants is dismissed for lack of evidence, it was here proper to continue the joint trial and submit to a jury the remaining substantive counts of the indictment charging each defendant with an independent and unrelated offense.

2. Where the District Court has plainly refused to submit an issue of fact to the jury for its determination, can the Court of Appeals properly affirm a conviction by making a finding on that issue of fact adversely to the defendants.

3. Whether the values of several separate and distinct transportations of stolen goods in interstate commerce may be aggregated to make up the $5000 or more value necessary to constitute an offense under 18 U. S. C. § 2314.

STATUTES AND RULES INVOLVED.

18 U. S. C. § 2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Section 2311 of Title 18, U. S. Code, provides in pertinent part as follows:

§ 2311. *Definitions*

As used in this chapter:

* * *

"Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

Section 2314 of Title 18, U. S. Code, as amended, provides:

§ 2314. *Transportation of stolen goods, securities, monies, or articles used in counterfeiting*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited secu-

rities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

Rule 8. Joinder of Offenses and of Defendants

* * *

(*b*) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

Rule 14. Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT.

There are set forth here only sufficient relevant facts to place in their proper setting the questions presented by these petitioners.

A. Summary of the Proceedings.

Petitioners Max and Norman Schaffer, father and son, were partners in a women's clothing store in Lebanon, Pennsylvania. In the course of several months in 1953, they made purchases of merchandise in New York City. Petitioners were indicted in the District Court for the Southern District of New York on October 10, 1954 for transporting in interstate commerce wearing apparel of a value in excess of $5,000, knowing that it had been stolen, in violation of 18 U. S. C. § 2314.

Petitioners were brought to trial with two other defendants, Marco and Karp, who had been indicted for similar offenses. Neither of these two other defendants —who are petitioners in No. 122, this Term—were connected with each other in any way, nor did they have any business relationship whatsoever with the Schaffers. Marco had purchased goods to be sent to Bluefield, West

Virginia. Karp had ordered goods to be shipped from New York City to Fall River, Massachusetts. In each of the cases, the buyers from West Virginia and Massachusetts purchased some of the goods from the same suppliers, the Stracuzzas, in New York, who sold goods to other customers in addition to the petitioners and Marco and Karp (R. 78-79).

The indictment submitted to the jury was originally in four counts. The first count alleged that during a period from May 15, 1953 to July 27, 1953, Max and Norman Schaffer, together with the Stracuzzas, knowingly transported and caused to be transported in interstate commerce, wearing apparel of a value in excess of $5,000, knowing the same to have been stolen, from the Southern District of New York to Lebanon, Pennsylvania, in violation of 18 U. S. C. § 2314.

The second count charged the Stracuzzas and Marco with making similar shipments from the Southern District of New York to Bluefield, West Virginia, from June 11, 1953 to July 27, 1953.

The third count charged the Stracuzzas and Karp with making similar shipments from the Southern District of New York to Fall River, Massachusetts from May 21, 1953 to July 21, 1953.

The fourth count charged all the defendants—the Stracuzzas, Max and Norman Schaffer, Marco and Karp—with conspiring (18 U. S. C. § 371) to violate 18 U. S. C. § 2314, by causing knowingly stolen goods to be transported in interstate commerce.

There was also a separate indictment alleging a conspiracy of the petitioners and the others to buy, receive, and have in their possession stolen merchandise.

Prior to the trial, the three persons implicated as the suppliers were removed from the case. Anthony

and Mario Stracuzza pleaded guilty to both indictments and both were awaiting sentence when the trial began. Anthony Stracuzza testified at length for the government. His wife's case was severed (R. 4, 10). Mario Stracuzza was not called by either side. These petitioners and Marco and Karp all pleaded not guilty and were all tried simultaneously in a single trial.

At the close of the prosecution's case, the District Court (Murphy, D. J.), essentially on his own motion (R. 11a), dismissed both conspiracy charges because of the failure of the government to come even close to proving a *prima facie* case.

Despite objections [1] that it would be prejudicial to the defendants to continue the trial on the remaining substantive counts, after the dismissal of the conspiracy count, the trial judge ordered the case to go forward as a joint trial, stating to counsel for petitioners:

> "What I am going to do now puts you in a most unique position. I am going to assume you are asking for a motion to dismiss counts 1, 2, 3 of Indictment 145-233, or for a directed verdict as to each of those counts, and I am going to reserve decision, *and you know from reading the cases that you put your case in at your peril, because it might develop to your disadvantage.*" (Italics supplied.)

and the three separate substantive counts were submitted simultaneously to the jury (R. 50a-64a). All the defendants were convicted.

---

1. While the cited objection was made orally only by counsel for Karp, it had earlier been agreed, with the concurrence of the trial judge, that any objection taken on behalf of any defendant would inure to the benefit of all the defendants (R. 10a-11a, 63a).

These petitioners and Karp were each sentenced to two years' confinement and a $10,000 fine, while Marco was sentenced to four years' confinement and a similar $10,000 fine (R. 269a).

Anthony and Mario Stracuzza, the suppliers, were each given suspended sentences of five years (R. 269a). After the trial, the remaining indictment was nolle prossed as to Dorothy Stracuzza (R. 10).

On appeal by these petitioners and Marco and Karp, the Second Circuit affirmed the convictions and denied timely petitions for rehearing.

B. The Prosecution's Case.

The defendant Anthony Stracuzza dealt in stolen property, primarily clothing, from New York's garment district. During the periods alleged in the indictment, he was in business for himself, under the trade name of Schafler, rather similar to his wife's maiden name (R. 19). His brother, the defendant Mario Stracuzza, bought the merchandise from truck drivers—the actual thieves—while the defendant Dorothy Stracuzza, Anthony's wife, worked in the show room. According to the Government, the Stracuzzas received stolen merchandise in the aggregate of well in excess of $100,000, for which they paid the truck drivers between 33⅓% and 45% of the wholesale price and which they sold for from 50% to 70% of the wholesale price (R. 66a).

Between May 15, 1953 and July 27, 1953, petitioner Max Schaffer visited Anthony Stracuzza's showroom in New York about every week or ten days, sometimes in company with his son, petitioner Norman Schaffer, and sometimes alone. On these occasions, Max examined merchandise that Anthony Stracuzza showed him.

and ordered certain quantities to be sent to him. Anthony Stracuzza packed quantities of the stolen merchandise, and shipped it to Lebanon via an interstate packing and transport service.

It was stipulated (R. 21a) that no single shipment was of a value of $5000, that each shipment to these petitioners was of a value of less than that sum, but that the total of all the shipments made to them during the period alleged in Count I of the indictment exceeded $5000. The actual value of all of the goods shipped to these petitioners between May 15, 1953 and July 27, 1953, was $19,531.52 (R. 108).

C. Consideration and Disposition at the Trial of the Issue Whether Any Agreement United the Several Shipments.

The record shows that this case was not tried on the view, later espoused by the Court of Appeals (R. 110), that the separate shipments to these petitioners could be aggregated because petitioners had an agreement or "contemplated a number of transactions" with the supplier. Anthony Stracuzza, the Government's principal witness, testified, on cross-examination by counsel for these petitioners, that their purchases had been made by selection (R. 79):

> "Q. Very good. Now, the purchases made from A. Schafler by Max and Norman Schaffer were generally for merchandise that was selected by them on the premises; correct?
>
> "A. If they are there in person, they can select on the premises, yes.
>
> "Q. I asked you, Mr. Stracuzza, whether or not most of all of the purchases that they made from A. Schafler were purchases made by selection

by them on the premises themselves; isn't that true?

"A. Yes."

The record also shows that the case was not submitted to the jury on the theory of purchases pursuant to a standing agreement; see (R. 15a-17a), as follows:

"Mr. Steinberg (counsel for Karp): * * *

"But insofar as the element of $5,000, which your Honor has already given attention to, I strongly urge that there is no proof here that there was a single impulse, that there was the kind of activity which was referred to in the Andrews case,[2] so that they can be aggregated into one count to make up five thousand, as has been done here, and the proof is totally defective in that regard.

"The Court: Well, counsel are agreed that the aggregate value with regard to each defendant exceeds five, and you are also agreed that no shipment individually equalled five.

"Mr. Steinberg: Yes.

"The Court: That is correct.

"Mr. Steinberg: Yes. But if your Honor please, the fact that he received $5,000 worth of merchandise over a period, and that no shipment was of that value, would mean under the Andrews case that you have to find a certain mental operation there; isn't that so, your Honor?

"The Court: Well——

"Mr. Steinberg: A certain scheme, or, in other words, that it was shipped pursuant—in other

2. *Andrews v. United States*, 108 F. 2d 511 (C. A. 4).

words, suppose he said this: 'I am ordering $20,000. Ship it to me in four installments.'

"The Court: In the Andrews case it was a conspiracy count to start with; it wasn't a substantive count.

"Mr. Steinberg: Yes, but wouldn't you have to—I ask this not captiously—wouldn't you have to have something like that here to aggregate it, if your Honor please?

"The Court: Well, that is part of the problem, gentlemen, as to whether you can or cannot aggregate these shipments without proof of some sort of matter.

"Mr. Steinberg: I leave that with your Honor. You have given it the attention, and I thank you very much for the attention you have given it.

"The Court: Gentlemen, I can tell you that it bristles with questions on which I am not completely satisfied.

"What I have in mind, although I don't want to cut you off, is to give the case to the jury on the three substantive counts, and tell them that they have to find that the value—and I suppose they will almost have to find it pursuant to stipulation—that the aggregate value is over five, and you have to take an exception to that part of the charge, see what the jury does, and then we consider it again, because I am not too clear what the definition in 2311 really means, where it says you can group these values together if they are included in one indictment. I am inclined to believe that the one indictment means the one charge, so that it is three separate counts relating to the three groups of de-

fendants. I don't think you can take one indictment and charge 70 men and prove a thousand dollars for each one, and then say since the indictment totals $70,000 it comes within the statute. I don't know, and I would like you to work on some sort of a charge with regard to that one item, and I will charge it the way you want me to, Mr. Moran.

"Mr. Moran (Assistant U. S. Attorney): All right, sir.

"The Court: And see what happens.

"Mr. Steinberg: We will be glad to submit requests to charge on that point, so your Honor will have them before you.

"The Court: Yes.

"Mr. Steinberg: As an alternative.

"The Court: But in order to conform with the status of the case now, in order to give it to the jury. I have to assume that the jury can consolidate the amounts over this period of time."

* * *

"The Court: That is the way I will submit it to the jury on that issue, so in effect your case should be devoted, I assume, to your guilty knowledge, and the question whether the goods were stolen."

The Government then submitted a requested charge on aggregating the value of the several shipments that made no mention of conspiracy, of agreement, or of course of conduct, but relied exclusively on the statutory definition of principals, 18 U. S. C. § 2; see Government's Request No. 2 (R. 100):

"The indictment charges that each of the defendants transported and caused to be transported in interstate commerce merchandise of value in excess of $5,000. In order to sustain a conviction, the Government is not required to establish that any of the defendants personally transported the merchandise alleged to have been stolen.

"It is sufficient if you find that each defendant aided and abetted the transportation of the merchandise by Stracuzza and thus caused such to be transported in interstate commerce.

"A defendant, if the evidence supports the charge, may be held as principal under a federal law, generally referred to as the Aiding and Abetting section, which reads:

> 'Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever wilfully accuses an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.'"

Both of the present petitioners requested instructions that would have required the jury to find, as a prerequisite to conviction, that the shipments to the Schaffers were made "pursuant to a single plan or agreement" and that the shipments "thus had unity of purpose." Here are the relevant instructions submitted to the Trial Judge on behalf of the petitioner Max Schaffer (R. 101).

"9. No violation of Section 2314 takes place unless the Government establishes beyond a reasonable doubt that the defendant, Max Schaffer, transported or caused to be transported merchandise of a value of Five Thousand Dollars ($5,000) knowing the same to have been stolen and converted. If the Jury finds that the shipments from on or about May 15, 1953, up to and including July 27, 1953, from the Southern District of New York to Lebanon, Pennsylvania, were entirely separate and distinct and were not in fact transported or caused to be transported by Max Schaffer, pursuant to a single plan or agreement with A. Schafler, such shipments cannot be grouped for the purpose of establishing the value of Five Thousand Dollars ($5,000), as required by the statute and must find the Defendant, Max Schaffer, not guilty. *Andrews v. United States*, 108 F. 2d 511 at page 514.

"10. In order to group the shipments between on or about May 15, 1953, up to and including July 27, 1953, the Jury would have to find beyond a reasonable doubt that the shipments were transported pursuant to a single plan or agreement between Max Schaffer and A. Schafler and thus had unity of purpose. *Andrews v. United States*, 108 F. 2d 511 at page 514."[3]

The trial judge refused to charge the jury on the issue presented by the above requests for charge.

3. Requests 8 and 9 on behalf of the petitioner Norman Schaffer (R. 102) were, except for the difference in numbering and the difference in the name of the defendant concerned, identical with the requests of the petitioner Max Schaffer quoted in the text. Motions for judgments of acquittal on the basis that there was a failure to establish the jurisdictional amount were also made by the petitioners and denied (R. 21a, 64a, 65a).

The instructions referred to the stipulation of the attorneys as establishing that the total value of shipments in each count exceeded $5000. The jury was told to "rely" on that stipulation, even though no individual shipment was of a $5000 value (R. 58a). This was in accordance with the requested charge submitted by the Government, which made no mention of conspiracy or agreement or course of conduct or aggregating the value of the several shipments. See Government Request No. 2, *supra*, p. 13.

Exceptions were duly made to the failure of the judge to give the instructions requested by the petitioners (R. 63a).

D. The Opinion Below.

The Court of Appeals affirmed these petitioners' convictions on two basic grounds.

First, the court below held that it was not necessary to decide whether it would be proper to aggregate the value of the separate shipments "in a case where the transactions are truly 'separate and distinct,' " because "Here * * * it is perfectly clear that the shipments with respect to each appellant were not 'separate and distinct' ", and that the petitioners, in negotiating with the suppliers, "contemplated a number of transactions" (R. 110).

Second, the court below held that although in view of Rule 8(b), F. R. Crim. P., it would have been clearly erroneous to try the defendants together in the absence of a conspiracy count, the presence of the conspiracy count, not shown to have been added by the prosecution in bad faith, sufficed to make the joinder proper, even though the conspiracy allegation was dismissed at the close of the Government's case. The court below

held that there was no prejudice resulting from the simultaneous submission to the jury of the three substantive counts against these different defendants, because of the trial judge's repeated admonitions—over fifty in number (R. 113)—to the jury during the trial not to consider evidence admitted with respect to one defendant against any of the others, as well as the cautionary instructions in the charge.

These petitioners sought a rehearing, pointing out *inter alia*, that their convictions had been sustained on a finding of fact by the appellate court rather than by the jury, and that the finding made by the Court of Appeals was on the precise issue which petitioners requested to have submitted to the jury and on which the District Court refused to charge. Rehearing was denied.

SUMMARY OF ARGUMENT.

I. Once the conspiracy counts were dismissed at the close of the prosecution's case, it was wholly improper to submit to the jury simultaneously the three remaining substantive counts against these petitioners and the two other defendants, Marco and Karp, who are petitioners in No. 122, this Term, because there was no common participation "in the same act or transaction constituting an offense" which is a pre-requisite to joinder. Such a joinder at that point could not be cured by any number of limiting cautionary instructions in the charge after a trial on conspiracy charges, and trial counsel made a very specific objection to the continuation of the trial in those circumstances.

The court below conceded that, absent the conspiracy counts, it would have been erroneous to try the several defendants together under Rule 8(b) of the

Fed. R. Crim. P. The same rule applies where the conspiracy counts were dismissed prior to submission of the case to the jury, for, after all, each count is to be considered as though it were a wholly separate indictment. *E.g., Dunn v. United States*, 284 U. S. 390, 393. Here, therefore, there were submitted to a single jury at the same time three separate indictments against three separate defendants unrelated to each other.

No authority supports the conclusion of the court below that it was proper to submit the unrelated substantive counts to the jury simultaneously after the link which bound the several defendants to each other —the conspiracy counts—had been dismissed; and *Kotteakos v. United States*, 328 U. S. 750, and *McElroy v. United States*, 164 U. S. 76, are strong and indeed conclusive authorities against what was done here.

This is not a situation where the proof against several defendants being tried together was properly submitted to the jury in the sense of Rule 8(b), F. R. Crim. P., and the appellate question went only to the sufficiency of the cautionary instructions. Every one of the eleven cases relied on by the court below was of that character. None involved the present situation, of unconnected charges against unrelated defendants simultaneously submitted to a single jury. Hence none of the cases cited in the opinion below are even remotely in point.

If specific prejudice need be shown, then the present record amply supports the danger of transference of guilt in mass trials to which this Court adverted in *Kotteakos*, 328 U. S. at 774.

The Court of Appeals relied principally upon the more than fifty admonitions to the jury during the trial

by the trial judge not to consider evidence admitted with respect to one defendant against any of the other defendants, as well as the cautionary instructions in the charge, as proof of the lack of such prejudice. The mere fact that so many instructions were here necessary is itself the best evidence that each defendant unnecessarily suffered because they were tried together.

Testimony at the trial, the prosecutor's summing up, and the judge's charge show, inescapably, that what each individual defendant was shown to have done bore on what all of the other defendants were charged with doing.

This naturally comes about since in a conspiracy trial declarations and acts by one co-conspirator committed in furtherance of the conspiracy and during its pendency are admissible against each co-conspirator. Courts admit evidence under this rule subject to instruction to disregard it against all but the declarant if it turns out there is no connection.

It is quite clear that where there is no basis to support the conspiracy charge, and the prosecutor has bracketed it with three substantive counts dealing with unconnected offenses involving different defendants, a great deal of evidence has been let in which, if there had been no conspiracy charged, would not have been admissible. When people conspire they invite mass trial by their conduct. When people do not conspire they should not be tried together in a common trial as co-conspirators.

II: It was improper for the court below to sustain the convictions on appeal by deciding against petitioners a vital factual issue which the trial judge refused to submit to the jury at the trial.

Here, as in *Grunewald v. United States*, 353 U. S. 391, reversing *United States v. Grunewald*, 233 F. 2d 556 (C. A. 2), the court of appeals has sustained a conviction on a theory of facts never submitted to nor passed upon by the jury. But the present case actually presents an *a fortiori* situation, because here the basis for affirmance set forth in the Court's opinion was not alleged in the substantive counts submitted to the jury, was not litigated at the trial, and was not only not submitted to the jury but appellants' specific request that it be so submitted was refused by the trial judge.

Petitioners were found guilty in the District Court on the theory of the statute that the values of *separate and distinct* transportations of goods may be aggregated. The instructions to the jury directed them to rely on the stipulation of the attorneys (R. 58a) as establishing the value of the goods for purposes of the definition of the offense (R. 58a). Instructions submitted by the petitioners, to charge the jury that they must find that several transportations had been made according to a single plan or agreement before aggregating the value of each transportation were refused by the trial court (R. 101, 102). The District Court deliberately refused to permit any jury consideration in this case of such a question of fact.

To sustain the convictions arrived at, it would be necessary to uphold the trial judge's interpretation that the statute permits aggregation of separate and distinct transactions. But the court below refused to affirm the convictions on the case as tried.

The theory on which the court below sustained petitioners' convictions was that aggregation was permitted of the shipments since "the proofs disclosed as to each appellant a sufficient 'unity for the purpose of the

statute' " and that now "no ruling should be made in a case where the transactions are truly 'separate and distinct' ".

Even the Government's brief, filed in the Court of Appeals, made no attempt to sustain the conviction on the theory of the trial court. The Government's position there was that "the shipments of stolen goods that were aggregated in this case were related in such a way that they had, in the words of Judge Parker in *Andrews v. United States, supra*, 'unity for the purposes of the statute' " (Government's Brief, p. 37).

It is clear that the court below affirmed the convictions by making that *finding of fact*, which the lower court had refused to permit the jury to make.

We are not aware of any other instance where a conviction has been affirmed by an appellate court on defendants' theory, not submitted to the jury, where the defendants themselves expressly urged that their guilt or innocence be determined on that precise theory. In addition, petitioners' convictions on this record have been affirmed on a theory that was never alleged in the count on which they were tried. This is, therefore, a stronger case against affirmance than *Grunewald* and accordingly requires a reversal.

III. Petitioners were found guilty of violating a statute which makes it a federal offense to transport in interstate commerce goods valued in excess of $5,000. A shipment of goods worth less than $5,000 is plainly outside the scope of the federal statute. Petitioners were implicated in several separate shipments, each involving goods worth less than the statutory minimum. They were nonetheless convicted in the District Court on an interpretation of the statute which permits aggre-

gation of totally separate and distinct transactions in order to reach the statutory minimum.

The Government has cited no authority for this interpretation, which we contend is clearly erroneous. In the Court of Appeals, the Government itself completely abandoned this theory and, not surprisingly, that court did not affirm on this theory.

The plain language of Section 2314 of the National Stolen Property Act makes it a federal crime knowingly to transport in interstate commerce stolen "goods, wares, merchandise, securities or money of the value of $5,000 or more." Transportation of goods worth less than that amount clearly would not constitute a federal crime.

This plain meaning is fortified by an examination of the entire statute, the legislative purpose and history, contemporaneous decisions of several courts of appeals at the time the statute was re-enacted, and by the accepted rules of statutory interpretation teaching that criminal statutes must not be extended beyond the clear scope of their language.

In the District Court, the Government relied upon 18 U. S. C. § 2311 for the proposition that independent transactions could be aggregated to establish the jurisdictional minimum value. That section states that the "aggregate value of all goods . . . referred to in a single indictment shall constitute the value thereof."

The language of this section is, to say the least, less than lucid. Legislative history strongly supports the view that aggregation is permissible only if the several transactions are the carrying out of a single plan or conspiracy. Repeatedly, the legislative materials explaining the incorporation of the clause permitting aggregation refer to a "series of transactions"

or a "series of violations." The word "series" denotes a succession of events having some connection or coordination, conforming to some overall plan. It is hardly in keeping with the random concept inherent in the theory of the statute under which petitioners were convicted.

The Court of Appeals for the Fourth Circuit decided in 1939 that ". . . transactions which are entirely separate and distinct cannot be grouped for the purpose of establishing a value within the statute, [but] they may be considered together where they are not separate and distinct but are the carrying out of a single plan or conspiracy." *Andrews v. United States*, 108 F. 2d 511, 514 (C. A. 4). This decision, persuasive authority in itself for the proper reading of the statute, cannot be said to have been rejected by Congress when it enacted the 1948 edition of the Criminal Code.

The most compelling witness to the error in the "separate and distinct" theory is the chariness of the Government to stand on the position taken, at its behest, by the District Court. In neither the Court of Appeals nor the Brief in Opposition to the Petition for Certiorari did the Government make the slightest effort to support the convictions on the case as tried. Quite the contrary, they have urged that these convictions should be affirmed on the precise theory of the statute under which petitioners sought, without avail, to be tried in the District Court. Remarkably enough, the Government has so far succeeded. Should the Government persist in this position, plainly the petitioners are entitled to have their convictions reversed and a new trial on the theory the Government now embraces.

ARGUMENT.

I. Once the Conspiracy Counts Were Dismissed, It Was Wholly Improper to Submit to the Jury Simultaneously the Unrelated Substantive Counts Against These Petitioners; Against Marco, and Against Karp.

At the close of the prosecution's case, the trial judge stated that "I am very much concerned about the conspiracy counts" (R. 11a), and asked for argument from the prosecutor "as to what you think the proof is on both conspiracy counts" (*id.*).

After such argument, the trial judge dismissed both conspiracy counts, Indictment No. 145-233 in its entirety, and Count 4 of Indictment No. 145-232 (*id.*), saying (R. 12a), "I don't think you have come anywheres close to the standard that you have to prove, either as to whether or not there were three separate conspiracies or just a general conspiracy."

At that juncture, with the conspiracy counts out of the case, the nexus linking the three substantive counts vanished. Count 1 (R. 5a) charged a substantive violation by these petitioners and the Stracuzzas, Count 2 (R. 5a) a substantive violation by Marco and the Stracuzzas, and Count 3 (R. 5a), another substantive violation by Karp and the Stracuzzas. At that juncture, therefore, three separate defendants were together on trial—and for the purpose of the discussion that follows, we treat the petitioners Schaffer as a single defendant, to obviate repeated verbal qualifications that do not vary the substance—three separate defendants were on trial, for three different offenses, offenses that were related only by the circumstance that each defendant had bought goods from the Stracuzzas.

It is petitioners' position that this was an improper trial incapable of cure by any amount of limiting instructions, no matter how often repeated.

1. Preliminarily, we should note that counsel made very specific objection to continuing the trial after dismissal of the conspiracy counts (R. 14a), a matter overlooked by the Government's suggestion (Br. Op. 6) that the effect of the misjoinder was never called to the attention of the trial court except by a pretrial motion for severance and a motion to dismiss.[4]

Objection to continuance of the trial having plainly been made, cf. Rule 51, F. R. Crim. P., counsel were not required to argue the same point thereafter; and it had earlier been stipulated with the consent of the court that objections made on behalf of one defendant would inure to the benefit of all (R. 10a).

Moreover, we think it equally plain that counsel's expressed satisfaction with the charge as given (R. 62a)—subject to the exception as to aggregating the value of the several shipments in the absence of a common plan or agreement (R. 63a)—did not amount to a waiver of the earlier specific objection to a common trial of unrelated accusations against unrelated defendants. The apparent intimation to the contrary in the opinion below (R. 113) on this point cannot, with all deference, be taken seriously.

2. With these preliminaries disposed of, we turn to the merits.

The court below conceded (R. 112) that "were it not for the conspiracy count, it would have been

4. We should also note that the Government's reliance (Br. Op. 6, n. 1) on *Kleven v. United States*, 240 F. 2d 270 (C. A. 8), is misplaced, since there the two defendants concerned were charged with joint participation in the same series of acts or transactions.

erroneous to try the appellants together under Rule 8(b), Fed. R. Crim. P. (*supra*, p. 4), for there would be no common participation 'in the same act or transaction constituting an offense' which is a requisite to joinder," citing, *inter alia*, *Kotteakos v. United States*, 328 U. S. 750.

Petitioners submit that, once the conspiracy counts were dismissed before the case was submitted to the jury, the principle just quoted from the opinion applied, and rendered equally erroneous the submission together of what remained in the case. Because, after all, each count in an indictment is to be considered as though it were a wholly separate indictment. *Dunn v. United States*, 284 U. S. 390, 393; *Selvester v. United States*, 170 U. S. 262. Consequently what was done here was to submit to a single jury, simultaneously, three separate indictments against three separate defendants unrelated to each other. That is to say, the trial judge permitted, and the court below sanctioned, a mass trial, with all of its concomitant opportunities for transference of guilt because of the association.

3. In the pretrial denial of the petitioner Karp's motion for a severance, *United States v. Stracuzza*, 158 F. Supp. 522 (S. D. N. Y.), the prosecutor's affidavit in opposition to that motion said, *inter alia*, that (103) "Information available to the Government indicates * * * that the defendants Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco were known to one another." On that sworn statement, and with Count IV alleging a conspiracy still included in Indictment No. 145-232, denial of the motion was proper, as these petitioners conceded below (Schaffer Br., C. A. 2, p. 18).

But at the trial the proof adduced by the prosecution failed to "come anywheres close to the standard that you have to prove" (R. 12a), and the court below conceded (R. 114) that there was nothing in the record to indicate that any petitioner knew of the Stracuzzas' dealings with the other petitioners.[5] Moreover, even if the proof were far stronger than it actually was, no appeal lies from the dismissal of the conspiracy counts, and hence it does not make for clarity of analysis for the Government inferentially (*e. g.*, Br. Op. 6) to suggest that there may well have been a conspiracy nonetheless.

4. The court below said (R. 113):

> "*The mere fact the conspiracy count is dismissed at the close of the evidence by the trial judge,* or that a verdict of acquittal on that count is returned by the jury, *does not establish as matter of law that it was error to submit the substantive charges to the jury.*"

We have added the italics to indicate the scope of our disagreement; the emphasized clauses are plainly in conflict with this Court's rulings, of which *Kotteakos v. United States*, 328 U. S. 750, is simply the latest.

There an indictment charged numerous defendants with a single conspiracy. At the trial the evidence showed that there were at least eight separate conspira-

5. In *United States v. Haupt*, 136 F. 2d 661, 674 (C. A. 7), the Court stated: "We think that if these facts had been known to the Trial Court at the time the motion for severance was made, it would have been an abuse of discretion for the Trial Court to have refused a severance. When presented again in the motion for a new trial and all of these facts and circumstances were known to the Court, it was likewise an abuse of discretion to overrule such a motion and thus refuse to remedy this prejudicial procedure."

ies, none of which had any connection with each other, although all the conspirators separately dealt with the central figure. The Supreme Court held that reversal was required, saying (328 U. S. at 772-774):

"Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together, or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

"Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. * * *

"Here toleration went too far. We do not think that either Congress, when it enacted § 269,[6] or this Court, when deciding the *Berger* case,[7] in-

6. Of the Judicial Code, 28 U. S. C. [1926 to 1946 eds.] § 391, the harmless error statute, repealed in 1948. The current provision is Rule 52(a), F. R. Crim. P.

7. *Berger v. United States*, 295 U. S. 78.

> tended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all: * * * The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place."

The factual situation here is very similar to that in *Kotteakos;* the Schaffers, Marco, and Karp all dealt with Stracuzza, but none of the first three had any connection with each other. But we have here an *a fortiori* case, because while in *Kotteakos* there was an allegation and a finding that all of the petitioners had conspired with Simon Brown, the central figure there, here every allegation of conspiracy with the central figure Stracuzza was eliminated before the case went to the jury.

In this aspect, *Kotteakos* did not in any sense break new ground; just half a century earlier, this Court had expressed the same principle in *McElroy v. United States,* 164 U. S. 76, 81:

> "While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction and

must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

The present case did not involve a conspiracy count duly submitted on which acquittal resulted; no conspiracy count ever went to the jury. Hence there is involved here only the submission to the same jury at the same time of separate substantive charges against separate defendants—actually, under the rule of count-equals-indictment (*supra*, p. 25), of three separate indictments against defendants unconnected one with the other.

Neither the court below in its opinion nor the Government here in opposition to our petition for certiorari cited any authority in support of the rulings below on that proposition—for the obvious reason that no such authority is available. No decision (other than the one now under review) supports the grossly improper practice of the trial here involved, and such cases as have been found on so plain a principle are, not at all surprisingly, to the contrary.

The commission by different defendants of distinct and separate offenses, not arising out of the same transaction, cannot be made the subject of a single indictment or of a common trial. *United States v. Harvick*, 153 F. Supp. 696 (D. N. Dak.); *United States v. Welsh*, 15 F. R. D. 189 (D. D. C.); *Coco v. United States*, 289 Fed. 33 (C. A. 8); *United States v. Geare*, 293 Fed. 997

(App. D. C.). As one of the draftsmen of the Federal Rules of Criminal Procedure said in *United States v. Welsh, supra*, 15 F. R. D. at 190,

> "* * * different unconnected offenses not arising out of the same series of transactions may not be joined in an indictment in which two or more defendants are charged. There is a good reason for that restriction. This is no technical limitation. The purpose is to prevent mass trials."

Indeed, not even the most speculative discussion has ever admitted the validity of the kind of joinder that was sanctioned here. See *United States v. Dietrich*, 126 Fed. 664, 670 (D. Neb.).

5. This is not a situation where the proof against several defendants being tried together was properly submitted to the jury in the sense of Rule 8(b), F. R. Crim. P., and the question on appeal concerned only the sufficiency of the cautionary instructions.

Not a single one of the eleven cases cited in the opinion of the court below (R. 114) dealt with the situation now presented here, where no conspiracy count ever went to the jury, and where three substantive counts each directed at a different defendant were simultaneously submitted in the absence of any question of conspiracy to supply a link between three unrelated counts each naming a different and unrelated defendant.

(a) In eight of the eleven cases cited in the opinion below, a conspiracy count had been submitted to the jury.

(1) *Delli Paoli v. United States*, 352 U. S. 232.
(2) *Opper v. United States*, 348 U. S. 84.
(3) *Blumenthal v. United States*, 332 U. S. 539.
(4) *Berger v. United States*, 295 U. S. 78.
(5) *United States v. Bando*, 244 F. 2d 833 (C. A. 2).
(6) *United States v. Chieppa*, 241 F. 2d 635 (C. A. 2).
(7) *United States v. Lebron*, 222 F. 2d 531 (C. A. 2).
(8) *United States v. Nash*, 54 F. 2d 1006 (C. A. 2).[8]

(b) In two more of the eleven cases cited in the opinion below, several defendants were jointly charged in at least one of the counts submitted to the jury.

(9) *United States v. Leviton*, 193 F. 2d 848 (C. A. 2).
(10) *Robinson v. United States*, 210 F. 2d 29 (D. C. Cir.).

(c) In the final case cited in the opinion below, a single defendant was tried on several indictments each of which charged similar offenses.

(11) *Dunaway v. United States*, 205 F. 2d 23 (D. C. Cir.).

Otherwise stated, not a single one of the eleven cases relied on by the court below is even remotely in point.

8. For more complete details of the *Nash* case, see the ruling there in the District Court. *United States v. Nash*, 51 F. 2d 253 (S. D. N. Y.).

6. Even in a simple conspiracy trial, uncomplicated by additional counts alleging substantive offenses, the admission of evidence against one conspirator that is plainly inadmissible against the others raises grave questions, notwithstanding the giving of full cautionary instructions. See *Delli Paoli v. United States*, 352 U. S. 232. Where protection of defendants would require abolition of conspiracy, as a crime, the courts have accepted the fiction of the effectiveness of the instructions to permit the continued existence *vel non* of the offense of conspiracy. But the holding in *Delli Paoli* does not and cannot justify what was done here, where there was no connection whatever between the several defendants—one in Pennsylvania, one in southernmost West Virginia, and one in southeastern Massachusetts—when the jury proceeded to deliberate on the guilt or innocence of all at the same time. No difficult choice is involved in this case since there is no reason for extending this policy beyond the circumstances which gave rise to it.

When the prosecutor added a count for conspiracy, it obviously placed the petitioners, in a case like this, in some difficulty. The reason is that it rendered admissible evidence of what Stracuzza, the chief Government witness, a co-defendant, said in the absence of the others, because if they are all co-conspirators, what one of them said in furtherance of the conspiracy would be admissible evidence. Not only did Stracuzza testify at this trial to the conversations and transactions that he had with Marco and Karp, but other Government witnesses testified as to what Stracuzza told them about his conversations and transactions between Marco and Karp, and Government witnesses also testified to the conversations that they themselves had with Marco and Karp.

Under these circumstances the admonition of the trial judge to the jury, at the end of the sixteen day trial (R. 19a, 20a) ". . . that the various exhibits and testimony that I admitted against one defendant *subject to connection* against the others is *now* admitted only against that particular defendant that the exhibit referred to or the testimony referred to" (italics added), is utterly incapable of fulfillment by twelve ordinary mortals. Even an IBM machine would have trouble.

7. The trial court recognized that the petitioners, after the government's case was concluded, could only put their case in "at your peril" (*supra* p. 7). It would have been perilous and literally impossible for each "particular defendant" to testify and produce witnesses in his behalf without conflicting with the defenses of the other defendants or diluting his own defense. Each defendant was admittedly entitled to present his defense in his own way without having "his" jury listen to the examination and cross-examination of the other defendants in the case who were no longer co-defendants even in name.

8. But if additional specific prejudice need be shown, if it be deemed necessary to further document the truism in *Kotteakos,* 328 U. S. at 774, quoted at pp. 27, 28 above, regarding the dangers of transference of guilt, such a showing can easily be made here.

(a) The admonitions of the trial judge not to consider evidence affecting only one defendant against either of the other two, no matter how often repeated, could not separate into three separate prosecutions what in actual fact was a single prosecution incapable of division into its constituent parts. It is only necessary to read the prosecutor's summing up (R. 22a-49a)

and the judge's charge (R. 50a-64a) to see how, inescapably, what each defendant was shown to have done bore on what the other defendants were charged with doing. Even the judge necessarily lumped all the defendants together at one important portion of his charge. He said (R. 55a):

> "For example, as against all the defendants, it says that the manufacturers' invoices, which Stracuzza says were included in the shipments were an obvious indication that the goods were stolen, because of the manner in which they were obliterated or torn; also, that the prices that the defendants paid were so out of proportion to the true market value, and that the copying of the style numbers from the manufacturer's invoice was a further indication.
>
> "It says, as to those defendants who were actually in the premises of Stracuzza, they must have known or at least should have known from the condition of the premises and the manner of the display of the goods that they were not legitimate, but stolen."

(b) According to the opinion below (R. 106), "The substantive counts went to the jury, the principal issue being whether or not each defendant knew that the goods he received from the Stracuzzas was stolen."

In its discussion of the evidence on that issue (R. 116), the court below lumped together evidence relating to Marco alone ("what were claimed to be humorous remarks by Marco to the effect that the goods were stolen," and testimony of a Marco employee as to altering labels); evidence relating to Karp alone (his dealings in other stolen property and his telephone call to

Stracuzza about protection); and evidence relating to Max Schaffer alone (a motion picture showing him in the Stracuzzas' showroom).

Anthony Stracuzza, the prosecution's principal witness, testified that he did not tell any of the defendants that the goods were stolen (R. 55a). The prosecution was therefore required to prove guilty knowledge on the part of each one. Plainly enough, the admission in a common trial of any of the items just mentioned would on that issue effectively prejudice petitioner Norman Schaffer, while the admission of the items relating to Marco and Karp would similarly prejudice petitioner Max Schaffer.

Accordingly, where the charge is an actual commission of a crime, prosecutors should not be permitted to add an additional count of conspiracy and receive the windfall of prejudicial inadmissible evidence where, after the Government's case is concluded, even a *prima facie* case of conspiracy has not been made out.

II. It Was Improper for the Court Below to Sustain the Conviction on Appeal by Deciding Against Petitioners a Factual Issue Which They Had Unsuccessfully Sought to Have Submitted to the Jury at the Trial.

Here, as in *Grunewald v. United States*, 353 U. S. 391, reversing *United States v. Grunewald*, 233 F. 2d 556 (C. A. 2), the Second Circuit has sustained a conviction on a factual theory never submitted to nor passed upon by the jury. (Interestingly enough, the judge who wrote the opinion below in this case also wrote for the Second Circuit in *Grunewald*.) But the present case actually presents an aggravated instance of the error committed below in *Grunewald*, because

here the basis for the Court of Appeals' affirmance was not alleged in the indictment; was never litigated at the trial; and was not only not submitted to the jury but these petitioners' specific requests that it be so submitted were totally denied by the trial judge.

1. In *Grunewald*, where this Court reversed because the theory on which the Court of Appeals sustained that conviction had not been submitted to the jury (Point II, 353 U. S. at 406-415), "The indictment was clearly sufficient to cover submission of this theory to the jury." 353 U. S. at 408, note 21.

Here, on the other hand, the only allegation affecting these petitioners that went to the jury, Count 1 of Indictment C-145-232 (R. 5a), did not allege that the several shipments made to them were made pursuant to an agreement or pursuant to a conspiracy. And every allegation of conspiracy naming these petitioners —Count 4 of Indictment C-145-232 (R. 6a) and the conspiracy indictment, No. C-145-233 (R. 8a-9a)—had been dismissed before submission of the case (R. 11a).[9]

Accordingly, petitioners' convictions on this record have been affirmed on a theory[10] that was never alleged in the indictment on which the jury deliberated. The result is that, as we have said before, this is therefore a stronger case for reversal than *Grunewald* was. Indeed, the situation runs afoul of the condemnation of *Cole v. Arkansas*, 333 U. S. 196, 201, that "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never

9. In *Lile v. United States*, 264 F. 2d 278 (C. A. 9), the indictment alleged a conspiracy to violate 18 U. S. C. § 2314. In *Andrews v. United States*, 108 F. 2d 511 (C. A. 4), the defendants were similarly charged with conspiracy to violate the predecessor provision. No substantive violations were in issue in either case.

10. *United States v. Gordon*, 253 F. 2d 177, 181 (C. A. 7).

tried as it would be to convict him upon a charge that was never made. *De Jonge v. Oregon*, 299 U. S. 353, 362." Here again, that was no innovation. "The rule that a man shall not be charged with one crime and convicted of another" was first formulated by Chief Justice Marshall. *Schooner Hoppet v. United States*, 7 Cranch 389, 394.

2. As the extract from Anthony Stracuzza's testimony shows (R. 79; *supra*, pp. 9, 10), no issue as to agreement *vel non* was litigated at the trial.

3. And, very plainly, the case was not submitted to the jury on the theory of purchases pursuant to an agreement; see the colloquy at R. 15a-17a (*supra*, pp. 10-12); the Government's request on aggregation of value (R. 100; *supra*, pp. 12-13); and the judge's charge on aggregation of value (R. 58a; *supra*, pp. 13-14).

To the contrary, the requests of these petitioners (Max Schaffer requests 9 and 10, R. 101; *supra*, p. 13; Norman Schaffer requests 8 and 9, R. 102) that the case be so submitted, that the jury should be instructed not to convict unless they found that the shipments were made "pursuant to a single plan or agreement" and that the shipments "thus had unity of purpose," were refused; and exception to such refusal was duly saved (R. 63a).

4. It is crystal clear from the opinion that the court below affirmed petitioners' conviction by making the precise finding of fact which the trial judge had refused to permit the jury to consider. Here is what the Second Circuit said (R. 110):

"We need not now decide what ruling should be made in a case where the transactions are truly 'separate and distinct.' Much may depend upon the facts of a particular case. Here, however, it is perfectly clear that the shipments with respect to each appellant were not 'separate and distinct.' Although the overall conspiracy between the Stracuzzas and the four appellants was not established, the proofs disclose as to each appellant a sufficient 'unity for the purpose of the statute.' All goods acquired by each appellant were acquired from the same distributor, Tony Stracuzza; all goods were acquired at the same discount according to a prearranged agreement; all shipments included within the indictment as to each appellant were concentrated within a specified time of no more than two and one-half months; each shipment had the same origin and destination; the merchandise shipped was all of the same type, ladies' and children's wear; and each appellant in negotiating with the Stracuzzas contemplated a number of transactions."

We disagree sharply with the factual conclusion drawn in the foregoing passage,[11] but that is beside the

11. The facts in this case clearly show that the transportations which actually took place to these petitioners were not the result of a definite standing agreement to purchase and transport these goods in the amount of $5000 or more. Each transportation was the result of a new and separate selection and purchase of different merchandise not pursuant to any previous agreement except for what the discount would be in the event of a purchase, and how the shipment would be made. The court below stated that the petitioners "contemplated a number of purchases" (R. 110). But there is a legal world of difference between contemplating a purchase and an agreement to purchase. Yet if we err in our interpretation of the facts, at the very least, it was a jury question. "Where a series of acts constitute either a single

point. What is significant is that despite the indisputable circumstance that the case was not tried on the basis of aggregating the value [12] of shipments made pursuant to an agreement and that the case was not submitted to the jury on that basis, the court below sustained the convictions on just that basis—and on that basis alone.

5. In *Grunewald*, this Court reversed because "under the judge's charge, the convictions * * * might have rested on an impermissible ground." 353 U. S. at 415. Here, however, the court below affirmed petitioners' convictions on a ground not only never submitted to the jury, but which petitioners unsuccessfully sought to have so submitted. In that respect, also, the present case is stronger for reversal than *Grunewald*. Indeed, the case at bar is probably unique in that it represents the only instance (or at least the only one of which we are aware) where a conviction has been affirmed pursuant to a theory on which the defendants themselves sought, but in vain, to have their guilt or innocence determined at the trial.

---

larceny or a succession of larcenies depending on the existence or nonexistence of certain conditions, the question of whether such conditions existed is one of fact for the jury." 52 C. J. S. § 139, p. 987.

12. The trial judge here had earlier expressed grave doubts on the question of value (R. 12a), and finally ruled as he did essentially for reasons of convenience (R. 18a): "I think it is fairer to the Government to give the jury a chance to say yes or no, and if they say no, that is the end of it. If they say yes, you have the right of appeal, and everything else."

III. Since Section 2314 of the National Stolen Property Act Limits the Federal Offense Interstate Transportation of Stolen Goods to a Transportation Having a Value of $5,000 or More, It Was Manifest Error to Permit Convictions of Petitioners by Adding Together the Value of Separate and Distinct Shipments, No One of Which Involved the Statutory Amount.

Petitioners were found guilty of violating the National Stolen Property Act by a jury to whom the case was submitted on the premise that the statute permits aggregation of the value of separate and distinct transportations of goods each less than $5,000. The Government espoused this theory at the trial in the District Court, but in the Court of Appeals below, the Government completely abandoned its progeny. It appears that novelty is its only virtue.

Obviously the proper place to begin consideration of any proble of statutory construction is the language of the Act, although we must not stop there.[13] *Association v. Westinghouse Elec. Co.*, 348 U. S. 437.

The unambiguous language of Section 2314 of the National Stolen Property Act makes it a federal crime knowingly to transport in interstate commerce stolen "goods, wares, merchandise, securities or money of the value of $5,000 or more. . . ." Transportation of goods worth *less* than $5,000 is *not* a federal offense.

This plain meaning is fortified by an examination of the entire statute; the legislative purpose; contemporaneous decisions of several courts of appeals;[14] and by the accepted rules of statutory interpretation which teach that criminal statutes must not be extended beyond the scope which is clearly defined by the language.

13. Mr. Justice Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 529 (1947).

14. 2 Sutherland, Statutory Construction (3rd ed.) §§ 5108, 5109.

Congress acted with conscious deliberation in setting a $5,000 minimum on the federal crime. Other provisions within the same statute incorporate monetary limitations varying in amount according to explicit Congressional purpose. In the very same Section 2314 Congress made the transfer in interstate commerce of any tool used in counterfeiting—regardless of value—a federal crime. In Section 2315 it made certain acceptance, as security for a loan, of stolen goods of the value of $500 or more a federal offense. In Sections 2312, 2313, 2316, 2317, it made the transportation or receipt of any stolen motor vehicle or cattle a federal crime—regardless of value. Clearly, Congress made a knowing and meaningful choice as to what shall be a *minimum value* basis establishing the scope of federal penal laws.

The legislative history of the National Stolen Property Act of 1934 discloses that Congress refused to pass any bill which did not contain a $5,000 minimum value on the offense of transporting stolen goods in interstate commerce. Bills that had a $300 minimum, $1,000 minimum, and $2,500 minimum were not enacted.[15] It is obvious that a dominant purpose of Congress was that no shipment of goods valued at less than $5,000 should be a federal crime.

While raising the minimum value to $5,000, the House of Representatives incorporated a provision for aggregation of values which became Section 5 of the Act of May 22, 1934 and subsequently Section 417 of Title 18 of the U. S. Code (1940-1946 editions):

> "In the event that a defendant is charged in the same indictment with two or more violations

15. Hall, Federal Anti-Theft Legislation, 1 Law and Contemp. Prob. 424 (1934).

> of this Act, then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of Sections 3 and 4 hereof."

The language of this section is less than lucid, to say the least. As we have already shown, Congress had intentionally declined to make it an offense to transport stolen goods worth less than $5,000. Such a shipment would not be a violation of the Act. Yet the aggregation section clearly applies only when there are "two or more violations" of the Act, necessarily meaning two or more shipments each worth $5,000 or more. Section 5 on its face excluded the possibility of aggregating the value of shipments worth less than $5,000.[16]

The "two or more violations" language does not appear in the section of the present Criminal Code derived from Section 5 of the original Stolen Property Act. The language, since 1948, is as follows:

> ". . . the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof." (18 U. S. C. § 2311)

16. Indeed, the legislative history may not be so persuasive as to overcome the literal language—"two violations"—and therefore a theory of the statute that values of separate transportations may be aggregated where they are pursuant to a single plan and there is a "unity of purpose", to establish the minimum value of $5000, may not be permissible. *Commissioner of Internal Revenue v. Acker*, 361 U. S. 87. Especially, since Federal criminal law is wholly statutory in every respect, *United States v. Hudson*, 7 Cranch 32, and admittedly constructive offenses are not favored, if Congress desired to create one offense from multiple non-criminal acts, the meaning might have been more clearly expressed. *Ladner v. United States*, 358 U. S. 169. Since the question of the proper construction of the Act may be reached by the Court, we felt it incumbent upon us to suggest this possible interpretation here, although we did not urge this construction of the statute at the trial or in the court below.

As applied by the District Court in this case, this section was construed to permit the adding together of the values of several separate and distinct shipments, each worth less than $5,000, in order to reach the statutory amount. The trial judge specifically rejected the theory put forward by the petitioners that the several distinct transactions cannot be aggregated unless they were in fact made pursuant to a single plan or agreement giving them unity of purpose.

In its most narrow form, the only question of statutory construction is whether the District Judge committed error in not submitting this theory of the statute to the jury. If, as petitioners contend, the trial judge was wrong, the convictions must be reversed. It is not strictly necessary that some other construction of the statute now be approved. Nevertheless, consideration of the correctness of the theory on which the case was tried is facilitated by comparing it with more tenable possibilities. Moreover, the Court may wish to provide guidance on future application of this particular statute.

The present language of Section 2311 does not speak with clarity on the question of the proper circumstances for aggregation. The legislative history of the National Stolen Property Act strongly supports the view that aggregation is permissible only if the several transactions are the carrying out of a single plan or conspiracy.[17] This totally refutes the theory upon

17. Although the statute was reenacted as part of the general revision of the Criminal Code in 1948, we have the assurance of the Revisers that the change in language was not intended to effect any modification in the provision for aggregation. "In the paragraph defining 'value', which came from said section 417 of Title 18 (U. S. C. 1940 ed.), words 'in the event that a defendant is charged in the same indictment with two or more violations of Sections 413-419 of

which petitioners were actually tried in the District Court.

It is known with certainty that the clause permitting aggregation came into the Act as a part of the compromise between the House of Representatives and the Senate over the size of the monetary amount to be incorporated into the definition of the offense. The Senate adopted a bill with a $1,000 limit, but the House subsequently raised the figure to $5,000. It was at this stage that the provision for aggregation of amounts first appeared. A highly likely interpretation of this legislative bargaining is that the aggregation clause was inserted as a safeguard against simple attempts to evade the higher statutory amount by dividing a total scheme into separate shipments, each below $5,000 in value. Necessarily this strategy would arise out of an overall plan or agreement which would give the individual shipments unity for purpose of the statute.

This interpretation is reinforced by the repeated use of the phrases "series of transactions" and "series of violations" in the legislative materials connected with this Act.[18] The plain meaning of the word "series" denotes a succession of events having some connection or coordination, conforming to some overall arrangement or plan. A ready example is the World Series in baseball. The principle of a "series" is, of course, wholly inconsistent with the random concept inherent in the "separate and distinct" transactions theory under which petitioners were convicted.

---

this title, then' were omitted and the same meaning was preserved by the substitution of the words 'a single' for the word 'such.'" H. R. Rep. No. 304, 80th Cong., 1st Sess., p. A145. The legislative history of the Act of May 22, 1934, retains its pertinence for guidance in interpreting the present version of the Stolen Property Act.

18. Appendix A2-A16.

A construction of the statute permitting aggregation only where there is unity of purpose or singleness of impulse comports with the common-law rule on the grading of larcenies. *E.g., People v. Cox,* 286 N. Y. 137, 36 N. E. 2d 84; *People v. Serna,* 43 Cal. App. 2d 106, 110 P. 2d 492; *Cartwright v. United States,* 146 F. 2d 133, 135 (C. A. 5); *United States v. Thomas,* 135 F. Supp. 662, 663 (E. D. Pa.). It is not to be assumed that Congress was unaware of this well-established rule of the common law in working out the statutory pattern of the new offense.

Furthermore, when Congress enacted the 1948 version of the Criminal Code, there is nothing in the history to reflect the slightest intention to reject the view of *Andrews v. United States,* 108 F. 2d 511 (C. A. 4), decided in 1939, where Judge Parker declared that: "While, of course, transactions which are entirely separate and distinct cannot be grouped for the purpose of establishing a value within the statute, they may be considered together where they are not separate and distinct but are the carrying out of a single plan or conspiracy." 108 F. 2d at 514.

It is virtually impossible to ascribe to Congress an intention to adopt the "separate and distinct" shipments theory applied by the District Court. The basic idea of joining together disconnected elements for the purpose of creating a crime is anathematic to the fundamental principles of our legal system. Under such a theory, conduct entirely innocent under the federal law when done would retroactively become criminal as a result of later independent actions. This result is inconsistent with the major premises of our Anglo-American system of criminal law.

Aggregation of "separate and distinct" transactions would lead to thorny problems of the statute of limitations. The Government's Brief in Opposition candidly admits that the charge against petitioners ". . . showed on its face that it covered shipments over a considerable period of time" (Brief in Opp. p. 8). It is conceivable, if not likely, that traditional statute of limitations doctrines would operate to permit unlimited relation back in time to reach transactions, not criminal when done, to be added to more recent conduct, similarly not criminal in itself.

It should be noted here that the argument against the "separate and distinct" theory is not an effort to insulate wrongful conduct from legal sanctions.[19] The crime here in question, interstate transportation of stolen goods, is a federally imposed superstructure over traditional state crimes. Extension of federal prosecution through unlimited aggregation of independent transactions would be an unnecessary intrusion into state affairs. See Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretions, 13 Law and Contemp. Prob. 64 (1948). If petitioners are guilty of complicity with dealers of stolen merchandise, their

19. It is therefore quite beside the point for the Court below to say (R. 111): "In the case before us there is no 'innocent act' being 'tainted' by subsequent occurrences; there is no legitimate interest of appellants worthy of protection; and the Congress has a very definite stake in curbing such socially undesirable conduct." With all deference, petitioners have and assert a thoroughly legitimate interest, that of not being deprived of their liberty in consequence of doing any act which Congress has, for any reason, not declared to be specifically criminal. The question is not whether petitioners' conduct was socially undesirable, but whether it was criminal; not whether they are good or bad men, but whether the prosecution has a good or bad case; and specifically, whether an act not criminal under federal law when done can thereafter be rendered criminal by reason of another act done much later, in the absence of either allegation or proof or jury finding that the two acts were linked by an agreement.

conduct on each one of the separate and distinct transactions would be a violation of state criminal law.

The most compelling witness to the error in the "separate and distinct" theory is the unwillingness of the Government to stand on the position taken at its behest by the District Court. In the Court of Appeals, the Government made no attempt to sustain the conviction on the theory applied in the trial court. The Government's argument on this point was that "the shipments of stolen goods that were aggregated in this case were related in such a way that they had, in the words of Judge Parker in *Andrews v. United States, supra,* 'unity for the purpose of the statute' " (Gov't Brief, p. 37, Appendix A17). It is not entirely surprising, therefore, that the Court of Appeals affirmed the conviction on the exact theory which the District Court had refused to apply.

The Government moved even farther from the position of the case, as actually tried, in the Brief in Opposition to the Petition for Certiorari. Whereas in the Court of Appeals the Government simply made no effort to argue on the theory applied by the trial court, the Brief in Opposition virtually admits that the theory underlying the convictions is invalid. It was stated that "Of course, if several shipments relate to wholly unconnected schemes, an indictment combining such unrelated charges might be open to attack on a charge of duplicity or misjoinder" (Br. in Op., p. 8).[20] To say that "wholly unconnected schemes" cannot be joined

20. The Government went on to say, however, that no attack had been made on the indictment here. When it is recalled that the indictment in this case bracketed the charges of separate shipments with a frivolous allegation of conspiracy (See Point I of Argument), thereby precluding any attack on the ground of misjoinder, the Government's position is, to say the least, untenable.

together in a single indictment is to say that they cannot be aggregated under Section 2311, for the one standard clearly in that section is whether the several transactions are in a single indictment.

Finally, if a penal Act of Congress is so drawn as to make it really difficult to say what was intended and what facts come within it, the statute should not be extended by legal alchemy to supply what is omitted. *McBoyle v. United States*, 283 U. S. 25; *United States v. Resnick*, 299 U. S. 207; *United States v. Cardiff*, 344 U. S. 174; *Bell v. United States*, 349 U. S. 81.

We submit that an interpretation of this statute permitting aggregation of the values of goods in separate and distinct transportations to establish the $5,000 value is unwarranted, unprecedented and unnecessary. Federal jurisdiction should not be stretched in penal statutes to cover doubtful cases and thereby invite problems of constitutionality. The District Court, in refusing to charge the jury that a finding of guilty must rest on a determination that the several shipments were related to a general plan or agreement giving them unity of purpose, committed error, and the convictions must be reversed.

CONCLUSION.

It is respectfully submitted that the judgment below should be reversed.

JACOB KOSSMAN,
1325 Spruce St.,
Philadelphia 7, Pa.,
Counsel for the Petitioners.

IRVING W. COLEMAN,
1920 Main Street,
Northampton, Pa.,
Of Counsel.

January 1960

APPENDIX

73D CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
No. 1462

TRANSPORTATION OF STOLEN PROPERTY IN INTERSTATE COMMERCE

MAY 3, 1934.—Referred to the House Calendar and ordered to be printed

MR. SUMNERS of Texas, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2845]

The Committee on the Judiciary, to whom was referred the bill (S. 2845) to extend the provisions of the National Motor Vehicle Theft Act to other stolen property, after consideration, report the same favorably to the House with amendments with the recommendation that the bill as amended do pass.

The committee amendments are as follows:

Page 2, line 1, strike out the words "'security' shall mean" and insert in lieu thereof the words "'securities' shall include";

Pages 2 and 3, strike out sections 3 and 4 and insert in lieu thereof the following:

SEC. 3. Whoever shall transport or cause to be transported in interstate or foreign commerce, any goods, wares or merchandise, securities, or money, of

the value of $5,000 or more, theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment of not more than 10 years, or both.

SEC. 4. Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares or merchandise, securities, or money, of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving in, or which are a part of interstate or foreign commerce, and which, while so moving or constituting such part, had been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than $10,000, or by imprisonment of not more than 10 years, or both.

SEC. 5. In the event that a defendant is charged in the same indictment with two or more violations of this act, then the aggregate value of all goods, wares, and merchandise, securities, and money, referred to in such indictment, shall constitute the value thereof for the purposes of sections 3 and 4 hereof.

Page 3, line 8, strike out "5" and insert "6".

Page 3, line 10, strike out the word "Security" and insert in lieu thereof the word "securities".

Page 3, line 10, strike out the word "has" and insert in lieu thereof the word "have".

Page 3, line 12, strike out "6" and insert in lieu thereof "7".

This bill is designed to punish interstate transportation of stolen property, securities, or money. Receiving, concealing, pledging, or disposing of such property, with knowledge that the same was stolen, is also made an offense.

As reported by your committee, the jurisdiction of the Federal Government is limited to cases in which the value of the stolen property is $5,000 or more, except in cases of pledging or accepting in pledge such property for a loan in which case the minimum is set at $500. There is added a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more.

It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General.

The bill is drafted to follow the language of the Dyer Act, the constitutionality of which has frequently been upheld in the Federal courts. It is not intended to limit the scope of that act, however. There is a precautionary provision to the following effect:

Nothing herein shall be construed to repeal, modify or amend any part of the act of October 29, 1919 chapter 89, cited as the National Motor Vehicle Theft Act.

Previous Congresses have considered bills providing punishment for interstate shipment of stolen property. In 1930 a national stolen property bill, H. R. 119 (71st Cong. 2d sess.), limited to property having a value

in excess of $300, was passed on February 5, but a similar bill in the Senate failed of passage. In the Seventieth Congress a national stolen property bill, without any limitation as to the value of the property involved, was favorably reported by the House Judicial Committee. A much narrower bill was favorably reported by Senate and House Committees in the first session of the Sixty-ninth Congress (S. 1871, S. Rept. 923; H. R. 7472, H. Rept. 1581). In the second session of this Congress the bill passed the Senate on December 10, 1936, but did not come to a vote in the House.

73D CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT No. 1599

EXTEND PROVISIONS OF NATIONAL MOTOR VEHICLE THEFT ACT TO OTHER STOLEN PROPERTY

MAY 11, 1934.—Ordered to be printed

MR. SUMNERS of Texas, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 2845]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 2845) to extend the provisions of the National Motor Vehicle Theft Act to other stolen property, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendments of the House numbered 1, 3, 4, 5, and 6; and agreed to the same.

Amendment numbered 2:

That the Senate recede from its disagreement to the amendment of the House numbered 2, and agree to the same with an amendment as follows:

In the matter proposed to be inserted by the House amendment, strike out beginning in line 13 on page 1 down through line 9 page 2 of the House engrossed amendments and insert in lieu thereof the following:

Sec. 4. Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more which, while moving in or constituting a part of interstate or foreign commerce, has been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment of not more than 10 years, or both.

On page 1, line 7, of the House engrossed amendments insert a comma after "money"; and the House agree to the same.

HATTON W. SUMNERS,
A. J. MONTAGUE,
TOM D. MCKEOWN,
RANDOLPH PERKINS,
Managers on the part of the House.

HENRY F. ASHURST,
WILLIAM H. KING,
WM. E. BORAH,
Managers on the part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the bill (S. 2845) to extend the provisions of the National Motor Vehicle Theft Act to other stolen property, submit the following statement in explanation of the effect of the action agreed upon by the conference and recommended in the accompanying conference report.

The first amendment of the House, page 2, line 1, to strike out "'security' shall mean" and insert "'securities' shall include", was agreed to.

The second amendment of the House was to strike out sections 3 and 4 of the original bill and insert in lieu thereof two new sections. The principal difference in section 3 as thus amended is the limitation of jurisdiction of the proposed act to the transportation of stolen goods, wares or merchandise, securities, or money, of the value of $5,000 or more. This section, as amended by the House, remains unchanged, except for the insertion of a comma after the word "money" on page 1, line 7, of the House engrossed amendments.

Section 4 makes it unlawful to receive, conceal, store, barter, sell, or dispose of certain goods, wares, or merchandise, securities or money, of a value of $5,000, or more. As passed by the Senate, this section provides a penalty for the receipt or disposition of such stolen property while moving in interstate commerce, knowing such property to have been stolen. As passed in the House, this section provides a penalty for the receipt or disposition of such property while moving in inter-

state commerce if such property was stolen while moving in interstate commerce, with knowledge that it was stolen while moving in such commerce. Section 4, as agreed upon in conference, provides a penalty for the receipt or disposition of such property stolen while moving in interstate commerce, knowing the property to have been stolen. The obvious purpose of section 4 was to protect interstate commerce by going after the "fence"—the guilty receivers or disposers of property, stolen while being transported in such commerce. The original Senate bill does not fully accomplish this, for it includes any stolen property, so long as it is received or disposed of while moving in interstate commerce. The conference amendment is limited to the receipt or disposition of property stolen while in interstate commerce, but such property need not be received or disposed of while moving in interstate commerce.

The second amendment of the House added, also, a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more. The Senate agreed to the amendment.

The third, fourth, and fifth amendments of the House are merely formal changes in the proposed act. They have been agreed to by the Committee of Conference.

HATTON W. SUMNERS,
A. J. MONTAGUE,
TOM D. MCKEOWN,
RANDOLPH PERKINS,
Managers on the part of the House.

76TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
No. 422

AMENDING THE NATIONAL STOLEN PROPERTY ACT

APRIL 18, 1939.—Referred to the House Calendar and ordered to be printed

MR. HEALEY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 1996]

The Committee on the Judiciary, to whom was referred the bill (H. R. 1996), to amend the National Stolen Property Act, after consideration, report the same favorably to the House with the recommendation that it do pass. The proposed legislation in the form in which it is here reported passed the House during the first session of the Seventy-fifth Congress (May 17, 1937). It failed to secure consideration in the Senate, however, and died with the adjournment of the Congress.

The bill widens the scope of the National Stolen Property Act of 1934 (48 Stat. 794; U. S. C., title 18, sec. 415) by making its provisions applicable to em-

bezzled property, securities and money, and counterfeited securities, in the particulars below noted. The bill has been recommended by the Attorney General.

SECTION 1

Section 3 of the Stolen Property Act makes it a Federal criminal offense knowingly to transport in interstate or foreign commerce stolen property, securities, or money of the value of $5,000 or more. This section of the law is amended by section 1 of the reported bill to include such transportation of property, securities, or money of the same minimum value which have been feloniously converted, and also to include transportation of falsely made, forged, altered, or counterfeited securities of the apparent or purported value of $5,000 or more. Counterfeited securities of the United States and foreign governments are exempted by a proviso because they are dealt with adequately by other provisions of existing law.

The limitation requiring the property involved to be of a value of $5,000 or more before the bill becomes operative is left unchanged. This limitation was put into the law for the reason, as stated in the House Judiciary Committee report (H. Rept. 1462, 73d Cong., 2d sess.) at the time the original bill was reported:

It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General.

It is to be noted, in this connection, that under the terms of section 5 of the act in the event the defendant is charged with a series of violations. the aggregate value of the property referred to in the indictment may be taken to make up the minimum valuation.

SECTION 2

Section 4 of the Stolen Property Act penalizes the act of knowingly receiving, concealing, or disposing of stolen property, securities, or money of the value of $5,000 or more in interstate commerce. It also makes the penalties of the act applicable to one who in interstate commerce pledges or accepts as security for a loan any property or securities of the value of $500 or more, knowing the same to have been stolen.

Section 2 of the reported bill amends this section of the law by extending its provisions, as in the preceeding amendment, to the case of embezzled property, money, and securities, and to forged or counterfeited securities, with the same limitations as to minimum real or apparent or purported value. The same exemption with regard to obligations of the United States or foreign governments as contained in the preceding section is contained in this amendment, and for the same reason.

The language with reference to the interstate-commerce element of the transactions denounced is clarified.

SECTION 3

Section 5 of the present act provides that in the event a defendant is charged with two or more violations of the act the aggregate value of the property, securities, and money involved shall constitute the value thereof for the purpose of meeting the minimum valuation requirements of the act.

Section 3 of the reported bill amends section 5 of the act by adding a clause defining the value of securities as the face, par, or market value, whichever is greatest. It also defines the value of forged or counterfeited securities as the apparent or purported face, par, or market value, whichever is greatest.

SECTION 4

Section 4 of the reported bill amends section 6 of the present act, by providing that persons violating the act may be tried in any district from which the transportation in interstate commerce takes place as well as into or through which such transportation occurs.

SECTION 5

This section adds a new conspiracy section to the act, to be known as section 7. It provides that when two or more persons enter into conspiracy to violate any provision of the act and commit any overt act toward effectuating the same, they shall be punished in like manner as provided in other sections of the act, that is, by a fine of not more than $10,000 or imprisonment for not more than 10 years, or both.

SECTION 6

This is merely a clerical change redesignating section 7 of the present act as "section 8." This is made necessary by the insertion of the new section 7 referred to in the preceding paragraph.

The following communication from the Attorney General addressed to the Speaker of the House recommends enactment of this legislation:

DECEMBER 29, 1938.

HON. WILLIAM B. BANKHEAD,

The Speaker, House of Representatives,

Washington, D. C.

MY DEAR MR. SPEAKER: The National Stolen Property Act, approved May 22, 1934 (48 Stat. 794; U. S. C., title 18, sec. 415), in effect makes it a criminal offense to transport in interstate or foreign commerce any stolen goods, securities, or money of a value of at least $5,000.

Experience in the administration of the act has indicated that it is desirable to include within its provisions property, money, or securities, that have been embezzled as well as those that have been stolen.

It is also desirable to include the transportation of counterfeit securities within the prohibitions of the statute. It need not, however, embrace counterfeit Government obligations or counterfeit foreign obligations, as the statutes relating to counterfeiting penalize their possession.

Section 1 of the enclosed bill, drafted in this Department, proposes to amend section 3 of the act in order to accomplish the foregoing results.

Section 4 of the present act relates to receiving stolen goods after their transportation in interstate or foreign commerce. The language of the act requires clarification on this point. Section 2 of the enclosed bill proposes to attain this objective, as well as to make it sufficiently broad to cover the receiving of embezzled property and of counterfeit securities.

Section 3 seeks to clarify the definition of "value" for the purposes of the act, while section 4 amends the

jurisdictional provisions of the statute to correspond with the other amendments. Section 5 would add a conspiracy provision to the statute.

I recommend the enactment of the bill.

A similar bill was passed by the House in the last Congress.

Sincerely yours, ——— ———, *Attorney General.*

In compliance with clause 2a of rule XIII, existing law is printed below in roman, with matter proposed to be stricken out enclosed in black brackets and new matter proposed to be inserted printed in italics:

SEC. 3. Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, *feloniously converted,* or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, *feloniously converted,* or taken, *or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities of the value of $5,000 or more, knowing the same to have been falsely made, forged, altered, or counterfeited,* shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: *Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in section 147 of the Criminal Code (U. S. C., title 18, sec. 261) or (2) an obligation, bond, certificate, security, treasury note, bill, promise to pay,*

or bank note, issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288), or by a bank or corporation of any foreign country.

SEC. 4. Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, [which, while moving in or constituting a part of interstate or foreign commerce, has been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen or taken,] *moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted or taken, or whoever shall receive, conceal, store, barter, sell, or dispose of any falsely made, forged, altered, or counterfeited securities, of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any falsely made, forged, altered, or counterfeited securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited* shall be punished by a fine of not more than $10,000 or by imprisonment [of] *for* not more than ten years, or both: *Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in section 147 of the Criminal Code (U. S. C., title 18, sec. 261), or (2) an obligation, bond, certificate, security, treasury note, bill, promise to pay,*

or bank note, issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288), or by a bank or corporation of any foreign country.

SEC. 5. In the event that a defendant is charged in the same indictment with two or more violations of this Act, then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 thereof, *and the value of any securities referred to shall be considered to be the face, par, or market value, whichever is the greatest. For the purposes of this Act, the value of any falsely made, forged, altered, or counterfeited securities shall be considered to be the apparent or purported face, par, or market value, whichever is the greatest, of the securities so falsely made, forged, altered, or counterfeited."*

SEC. 6. Any person violating this Act may be [punished] *tried* in any district *from*, into or through which such goods, wares, or merchandise, or such securities, or money *or such falsely made, forged, altered, or counterfeited securities* have been transported or removed.

SEC. 7. *If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.*

EXTRACT FROM GOVERNMENT'S BRIEF.

Despite the Court's dismissal of the conspiracy count under Indictment C 145-232, the evidence nevertheless established that each of the appellants in their original negotiations with Tony Stracuzza contemplated, not merely one purchase, but a series of purchases. The discussion of the discount to be given and the arrangement for the sending of the copies of the original manufacturers' invoices with the cartons of merchandise would be meaningless unless the parties contemplated a number of transactions. That the evidence sufficiently indicated a related series of shipments is in no way inconsistent with the failure to prove the conspiracy.

The shipments of stolen goods that were aggregated in this case were related in such a way that they had, in the words of Judge Parker in Andrews v. United States, supra, "unity for the purpose of the statute." (Gov't Brief, p. 33 in Court below.)